

Second Amended Complaint, Dkt. #1215 at 34. The State has also sought statutory penalties and damages. *Id.* at 34-5.¹

The State has accumulated substantial evidence of serious and irreparable environmental injury and human health risks resulting from the land application of poultry waste within the IRW. *See, e.g.,* State's Motion for Partial Summary Judgment, Dkt. #2062; and State's Motion for Preliminary Injunction, Dkt. #1373. At trial, Defendants will likely respond to the State's injury evidence by claiming that if the requested relief is granted, it will impose an economic hardship on third parties -- such as the poultry growers. Defendants may also argue or present evidence that the requested relief would otherwise adversely impact the local economy by, *e.g.,* decreasing tax revenues, increasing food costs or causing the loss of jobs.

First, because this matter involves an endangerment to health and the environment and the State here is a sovereign, balancing of harms is to be accorded no weight in the Court's equitable analysis. Thus, any evidence or argument concerning any alleged economic impact from issuance of an injunction is utterly irrelevant.

Second, even if the Court were to conduct some balancing of harms analysis, evidence and argument as to economic impact to third parties is still irrelevant under the applicable standard. The State did not sue the poultry growers, and does not seek to hold the grower liable. It is ***Defendants'*** culpability which is at issue here.

¹ As of the filing of this Motion, the State's claims for damages have been dismissed. However, on August 3, 2009, the State filed a Motion for Reconsideration (Dkt. # 2392) of the Court's earlier Opinion and Order (Dkt. # 2362) to the extent that the Court dismissed the State's CERCLA claims found in Counts 1 and 2 of the Second Amended Complaint. If the Motion for Reconsideration is granted, the State's claim for CERCLA natural resource damages could be resurrected. As no ruling on the Motion for Reconsideration has been made as of the date of filing this present Motion, out of an abundance of caution and a desire for judicial economy, the present Motion addresses some issues related to damages.

In sum, evidence and argument as to the alleged economic impact that may result if the requested relief is granted is irrelevant and should be excluded as such.² In particular, because the State's claim for injunctive relief is for the Court's determination, and not the jury's, evidence or argument as to any such economic impact is categorically inadmissible at trial before the jury.

II. Legal Standard

"Evidence which is not relevant is not admissible." Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. "Though the standard for relevance under Federal Rule of Evidence 401 is quite generous, *see United States v. Jordan*, 485 F.3d 1214, 1218 (10thCir. 2007), proffered evidence must, at minimum, advance the inquiry of some consequential fact to be considered relevant and admissible. *See* 7 Kenneth S. Broun, *McCormick on Evidence* § 185 (6th ed. 2006)"; *United States v. Oldbear*, 568 F.3d 814, 820 (10thCir. 2009).

III. Argument

A. Evidence and Argument Regarding Any Alleged Economic Impact that May Result From the Relief Requested by the State is Irrelevant

1. Injunctive Relief and Balancing Harms

a. Balancing of Harms is Irrelevant Because the State is a Sovereign Entity

² For the purposes of the hearing on the State's Motion for Preliminary Injunction, the Court determined that Defendants could present balancing of hardships evidence with respect to Defendants *and* the poultry growers. PI Tr., Vol. VI at 1654:17 – 1656:6. The Court based this ruling on the fact that the State had alleged: (a) the growers are the agents of Defendants; and (b) Defendants control these growers through an oligopoly business practice. *Id.* However, because the poultry growers are not "parties" to this litigation, the Court's ruling should not be extended to the trial on the merits. *See* § III.A, *infra*.

Ordinarily, in deciding whether to grant a permanent injunction, courts are to consider whether “the threatened injury [to the plaintiff] outweighs the harm that the injunction may cause the opposing party.” *Prairie Band of Potawatomi Nation v. Wagnon*, 476 F.3d 818, 822 (10th Cir. 2007) (quoting *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003)) (emphasis added). However, the case at bar is not the “ordinary” case. Because this matter involves an endangerment to health and the plaintiff here is a sovereign, the balancing of harms is to be accorded no weight in the analysis. Thus, any evidence or argument with respect to the potential economic impact that would result from an injunction is clearly irrelevant.

The Fourth Circuit’s decision in *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331 (4th Cir. 1983), is especially instructive on this point. In *Lamphier*, state agencies sought a RCRA injunction against a defendant (“Lamphier”) who engaged in the business of industrial waste disposal. Significantly, the plaintiff state agencies in *Lamphier* had learned that Lamphier was transporting wastes to his farm and “disposing of them by land application and lagooning of bulk liquids” *Lamphier*, 714 F.2d at 333 (emphasis added). As a result, one of the plaintiff state agencies issued an emergency order requiring Lamphier to “contain all runoff from lagoons and land application areas and submit a list of wastes deposited at the facility.” *Id.* (emphasis added). After Lamphier refused to apply for a RCRA operator’s permit and refused to remove hazardous wastes from his property, the state agencies (and other plaintiffs) filed suit. After a bench trial, the district court concluded that Lamphier had violated provisions of RCRA and issued an injunction ordering Lamphier to comply with applicable waste regulations. The district court further ordered Lamphier to provide the plaintiffs with access to his farm for the purposes of monitoring wastes.

On appeal, Lamphier pointed to the “hornbook rule” that in order to obtain injunctive relief, a movant must prove that the balance of equities supports the injunction. Lamphier argued that because the plaintiffs did not attempt to prove irreparable injury, the district court's grant of injunctive relief was improper. The Fourth Circuit disagreed, holding and reasoning as follows:

[T]he law of injunctions differs with respect to governmental plaintiffs (or private attorneys general) as opposed to private individuals. Where the plaintiff is a sovereign and the activity may endanger public health, “injunctive relief is proper, without resort to balancing.” *Illinois v. [City of] Milwaukee*, 599 F.2d 151, 166 (7th Cir. 1979), *rev'd on other grounds*, 451 U.S. 304, 101 S.Ct. 1784, 68 L.Ed.2d 114 (1981).

“The United States . . . is not bound to conform with the requirements of private litigation when it seeks the aid of courts to give effect to the policy of Congress as manifested in a statute. It is a familiar doctrine that an injunction is an appropriate means for enforcement of an Act of Congress when it is in the public interest.” *Shafer v. United States*, 229 F.2d 124, 128 (4th Cir. 1956). This rationale applies equally to state enforcement of federal and state health laws.

Lamphier, 714 F.2d at 337-38 (emphasis added). *See also United States v. Bethlehem Steel Corporation*, 38 F.3d 862, 867 (7th Cir. 1994). The *Lamphier* case is on point. Simply put, in the case at bar, balancing of the equities is not necessary or even prudent. Thus, evidence concerning the balancing of equities -- including economic impact evidence -- is irrelevant and should be precluded.

b. Balancing of the Harms Evidence As to Third Parties is Irrelevant

Even if the Court were to conduct balancing of the harms analysis, any balancing of the harms evidence with respect to third parties is still irrelevant. Again, the permanent injunction test deals with whether “the threatened injury [to the plaintiff] outweighs the harm that the injunction may cause the opposing *party*.” *Prairie Band of Potawatomi Nation*, 476 F.3d at 822

(emphasis added). Limiting the inquiry to the opposing “party” is only logical. For instance, where a corporation is sued under Title VII and faces injunctive relief, that corporate defendant could not rightfully avoid being enjoined by presenting evidence that its employees or agents might incur economic hardship if the injunction were issued. Such an alleged “injury” to the agents or employees of a party corporation is not injury to the party corporation itself.

In the case at bar, while the third party poultry growers are agents of the corporate Defendants, they are not “parties” to this litigation. Many courts have recognized the obvious point that even employees of a party corporation are not themselves “parties” to litigation. *See, e.g., El Dorado Irrigation Dist., Inc. v. Traylor Bros., Inc.*, 2007 WL 512428, *10 (E.D.Cal. Feb. 12, 2007); *N.L.R.B. v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 615 (9th Cir. 1973); *Pochat v. State Farm Mutual Automobile Ins. Co.*, 2008 WL 5192427, *6 (D.S.D. Dec. 11, 2008). Thus, any alleged hardship that such third parties could experience if the requested relief is granted is irrelevant and inadmissible for the purposes of this litigation. That is, such balancing of the hardships evidence does not “advance the inquiry of some consequential fact...” *Oldbear*, 568 F.3d at 820.³

2. Monetary Relief

Similarly, the possible economic impact that could result from an award of damages or imposition of civil penalties has no conceivable relevance to any claim or defense in this case. For instance, it is possible that Defendants will argue or offer evidence that the imposition of such monetary relief against them could result in an increase in the price of chicken, job losses in the poultry industry or lost tax revenues. Aside from being hopelessly speculative, such

³ Indeed, this Court has already ruled that that the issue of whether the State made any pre-filing evaluation of the potential adverse impact on the growers was irrelevant in the context of a motion to compel filed by Defendant Cal-Maine. *See* Dkt. #1336 at 3; and Dkt. #1234 at 9-12.

argument or evidence is plainly irrelevant. Such argument or evidence – if presented – would be nothing more than a personal appeal to the fact-finder in order to illicit an emotional response. Any attempt to use irrelevant argument or evidence to arouse the emotions or prejudices of the fact-finder is wholly improper. *See, e.g., Whittenburg v. Werner Enterprises, Inc.*, 561 F.3d 1122, 1128-30 (10th Cir. 2009) (citing Model Rules of Prof’l Conduct R. 3.4 (“A lawyer shall not ... in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence”)) (other citations omitted). Therefore, any argument or evidence as to the potential economic impact from the imposition of monetary relief against Defendants should be precluded.

B. Evidence and Argument Regarding Any Alleged Economic Impact that May Result From the Relief Requested by the State is *Categorically* Inadmissible for the Purposes of Trial Before the *Jury*

Though the State believes that such evidence is entirely irrelevant, evidence concerning potential economic impact that could result from the requested relief is only *arguably* relevant to the State’s claim for injunctive relief. Even if admitted for the purposes of deciding whether an injunction should issue, any evidence of economic harm would be of limited probative value at best. *See, e.g., Colorado Wild, Inc. v. United States Forest Service*, 523 F.Supp.2d 1213, 1222 (D.Colo. 2007) (“[E]conomic harm...is not irreparable and does not outweigh the serious risk that irreparable environmental harm will result” if defendant were allowed to proceed with construction project) (citations omitted); *National Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 738 (9th Cir.2001) (Intervenor-defendant’s alleged “loss of anticipated revenues...does not outweigh the potential irreparable damage to the environment...”); *Interfaith Community Organization v. Honeywell Int’l, Inc.*, 263 F.Supp.2d 796, 874 (D.N.J. 2003) (“The only foreseeable harm to Honeywell from an injunction compelling it to remediate the Site is

economic in nature....Honeywell is a large international corporation with revenues in the billions of dollars. The Court therefore concludes that the economic harm to Honeywell from the requirement that it fund a permanent remedy for the Site does not outweigh the interests of the public in a prompt cleanup of the Site that is protective of human health and the environment.”).

However, this Court, and not the jury, will decide whether any equitable relief will be granted. *See, e.g., Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 479 (1962); 9 Wright & Miller, *Fed. Prac. & Proc. Civ.3d* § 2308 (2009). Therefore, any argument or evidence regarding potential economic impact that could result from the requested relief is categorically inadmissible at trial before a jury. *See, e.g., Computer Associates Int’l, Inc. v. American Fundware, Inc.*, 831 F.Supp. 1516, 1528 (D.Colo. 1993) (Excluding defendant’s evidence of economic consequences of injunction because: “claim for injunctive relief is a matter for [court’s] determination, not the jury’s”; and “[a]ny financial data relevant to this claim will be presented to [court] after the jury reaches a verdict, not during trial.”) As such, even if any economic impact (*i.e.*, increase in the price of chicken, lost tax revenues) evidence or argument is admitted by the Court, such evidence or argument unequivocally cannot be properly presented to the jury.

WHEREFORE, premises considered, the State respectfully requests that the Court grant this Motion in Limine and enter an Order precluding Defendants from making any argument, doing any questioning, or proffering any evidence regarding any alleged adverse economic impact to any person or entity which may result if the relief requested (injunctive relief and damages) by the State in its Second Amended Complaint is granted by the Court.

Respectfully submitted,

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